



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Akal Security, Inc.

**File:** B-261996

**Date:** November 16, 1995

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Daya S. Khalsa for the protester.

Cynthia S. Guill, Esq., and Kenneth M. Homick, Esq., Department of the Navy, for the agency.

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## DIGEST

1. An award to an offeror submitting an unreasonably low or below-cost offer on a fixed-price contract is not legally objectionable.
2. Where a protester would not have been awarded contract under either a best value or a low cost, technically acceptable evaluation scheme in a negotiated procurement, the protester has not been prejudiced by the agency's unannounced change to its evaluation scheme.

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## DECISION

Akal Security, Inc. protests the award of a contract to Nation Wide Security, Inc. under request for proposals (RFP) No. N62472-93-R-3613, issued by the Department of the Navy for security guard services at the Naval Undersea Warfare Center Division and Detachments in Newport, Rhode Island; New London, Connecticut; and Dresden, New York. Akal protests that the agency's source selection decision was inconsistent with the stated evaluation scheme.

We deny the protest.

The RFP, issued on September 21, 1994, contemplated award of a firm, fixed-price contract (a portion of which included indefinite quantity work) for 1 year with 4 option years. The RFP designated technical subfactors and corresponding criteria with their relative weights, and stated that award would be made on a best value basis with price and technical factors being of equal weight.

The Navy received 19 proposals, which were evaluated by a technical evaluation board (TEB) and a price evaluation board (PEB). After the TEB and PEB evaluations were reviewed by a source selection board (SSB), 15 proposals were included in the competitive range; of these 15 proposals, one was rated exceptional,

two were rated acceptable, and the remainder, including the proposals of Akal and Nation Wide, were rated unacceptable but capable of being made acceptable.<sup>1</sup>

In February 1995, the Navy conducted written discussions with the competitive range offerors, and requested revised proposals which were evaluated by the TEB and PEB. Although some of the revised proposals corrected some of the initial proposal deficiencies, the ratings remained the same. After a second round of written discussions, the TEB determined that three of the previously unacceptable proposals, including Akal's and Nation Wide's, were acceptable; the rest of the previously unacceptable competitive range proposals remained unacceptable but capable of being made acceptable. A third round of written discussions and revised technical proposals followed, but the technical ratings did not change. By letter of May 7, the Navy requested best and final offers (BAFO). The BAFOs rated at least acceptable were as follows:

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<sup>1</sup>The Navy's source selection plan stated that technical proposals would be rated using the following adjectival scale:

~~Exceptional~~—proposal exceeds requirements in a way that is beneficial to the government.

~~Acceptable~~—proposal meets minimum requirements.

~~Unacceptable/susceptible of being made acceptable~~—proposal contains deficiencies which are susceptible to correction through reasonable discussions.

~~Unacceptable~~—proposal contains deficiencies which are so major and extensive as to require major revision and should be eliminated from further consideration.

The Navy evaluators also employed plus or minus signs to further differentiate the technical ratings.

Offeror	Rating	Price
A	Exceptional	\$12,438,375
B	Acceptable ++	11,400,566
C	Acceptable +	12,840,427
Akal	Acceptable	10,965,926
Nation Wide	Acceptable	9,778,036
D	Acceptable	11,145,095

As requested in the RFP, offerors broke their prices into the following components: labor rate, equipment and material, training, burdened hourly rate, and “other” (costs for management, supervision, quality assurance, overhead, and profit). The PEB found that Nation Wide’s price might be unreasonably low compared to the other BAFO prices and the government estimate.<sup>2</sup> Nearly all of Nation Wide’s price advantage was attributed to its extremely low costs and a reduced profit margin in the “other” category. The PEB determined that Nation Wide may not be able to effectively provide management, supervision, and quality control, and still be able to cover its overhead and realize a reasonable profit under its stated cost breakdown. The PEB thus considered Nation Wide’s price to be unreasonably low, and recommended that award be made to Akal, which had submitted the next lowest priced, technically acceptable BAFO.

The source selection authority (SSA) reviewed the PEB report and was concerned that the PEB, in concluding that Nation Wide's price may be unreasonably low, placed undue weight on the historical contract prices for this requirement without realizing why those prices may have been higher than what now could reasonably be expected. In this regard, the prior solicitations were restricted to section 8(a) small disadvantaged business contractors, whereas this RFP was not. Moreover, one of those contracts was terminated for default, and the current incumbent contractor, receiving award on a sole source basis to replace the defaulted contractor, had to mobilize under an expedited time frame of 48 hours, while 2 months are available for mobilization under the current RFP. Because of this concern, the SSA requested the PEB to reconvene and review whether Nation Wide could perform acceptably at its proposed price considering all of its costs, notwithstanding its proposed costs under the “other” category, and requested that the PEB review the government estimate. The SSA also instructed the SSB to consider whether Akal’s BAFO would be the best value to the government considering that its price was more than \$1 million higher than Nation Wide’s BAFO.

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<sup>2</sup>The government estimate was \$12,728,122.

The PEB telephoned Nation Wide for a price verification. Nation Wide stated that the price submitted was its intended price. It stated that it submitted this proposal with the intent of being extremely competitive, and that it had intentionally reduced its profit margin and excluded general overhead costs from its BAFO. Nation Wide stated that it did not intend for this contract to be a “money maker” for the firm. The PEB also determined that the preparation of the government estimate and its prior price unreasonableness determination were unduly influenced by the prior procurement history in that it had failed to consider that the higher costs and the difficulties encountered under the prior 8(a) contracts were unique to those contracts. Moreover, the PEB reviewed its prior price analysis and determined that, except for the “other” category, Nation Wide’s costs were comparable to the costs of the other technically acceptable offerors. Based on this review, the PEB determined that Nation Wide’s proposed price was reasonable.

Considering that Nation Wide’s BAFO price--now deemed reasonable--was more than \$1 million lower than Akal’s similarly rated BAFO, the SEB recommended award to Nation Wide. The SSA concurred in this recommendation and the Navy awarded the contract to Nation Wide on June 30. This protest followed.

During the course of this protest, the Navy stated that the documentation supporting the source selection decision was incomplete. The SSA stated that since she requested the PEB and the SSB to reconsider their initial findings in mid-June, she accepted the incomplete written documentation supplemented by oral reports from the PEB, TEB, and SSB in order to meet a June 30 projected award date.<sup>3</sup> The SSA subsequently required the boards to submit amended written reports documenting the oral information upon which the source selection decision was based.

The protest record contains the written documentation as of the time of the award, the amended reports, and the SSA’s explanatory statement. The amended reports specifically stated that the TEB determined that the BAFOs submitted by Nation Wide and Akal were “technically equivalent.” In her accompanying statement, the SSA states that the contract was awarded to Nation Wide as the “low, technically acceptable offeror.” The record contains no evidence that the Navy considered any of the higher rated, higher priced BAFOs in making its source selection decision.

Akal first alleges that the award to Nation Wide was improper because Nation Wide’s price is unreasonably low, specifically, that Nation Wide’s price does not provide for payment of wages in compliance with the Service Contract Act wage

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<sup>3</sup>The agency wanted to make award by June 30 so that the awardee would be able to mobilize in time to assume contract responsibilities when the current contract expired at the end of August.

rate determination incorporated in the RFP. However, an offer for a fixed-price contract submitted at a price that appears lower than the cost of wage rates applicable pursuant to the Service Contract Act is nonetheless acceptable where the offer does not take exception to, or otherwise evidence an intent by the offeror to violate, the requirements of the Service Contract Act. Advanced Management, Inc., B-258942, Feb. 23, 1995, 95-1 CPD ¶114. Our review of Nation Wide's BAFO shows that, not only did Nation Wide not take exception to the wage rate requirement, it specifically stated in its BAFO that it would comply with the applicable Service Contract Act wage rates.<sup>4</sup>

Akal also alleges that the technical evaluation was unreasonable for failing to consider the effect of Nation Wide's low price on the technical quality of its BAFO.<sup>5</sup> However, where, as here, the stated technical evaluation criteria do not provide for consideration of price in the technical evaluation, a protester's claim that an offered

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<sup>4</sup>In fact, the wage rates which Nation Wide proposed in its BAFO meet or exceed all of the requirements of the DOL wage rate determinations required pursuant to the Service Contract Act. Akal also seems to allege that Nation Wide's price is insufficient for contract performance. This essentially is a challenge to the agency's acceptance of an alleged below cost offer. There is no prohibition against a procuring agency's accepting an unreasonably low or below-cost offer on a fixed-price contract. Id.; Intown Properties, Inc., B-256742, July 11, 1994, 94-2 CPD ¶ 18. By awarding a fixed-price contract to such an offeror, the contracting agency has necessarily determined the offeror to be responsible, a determination which our Office will not review absent a showing of possible fraud or bad faith or that definitive responsibility criteria in the solicitation have been misapplied. Intown Properties, Inc., supra.; 4 C.F.R. § 21.3(m)(5) (1995). Akal has made no such showing.

<sup>5</sup>In its initial protest letter, Akal alleged that, during discussions, the Navy asked it only one "very minor question," and asserted that it thus must have submitted a technically superior proposal. In fact, the letter from the agency to Akal, which served as written discussions, identified several areas of agency concern regarding Akal's technical and price proposals, including three technical issues where Akal's proposal was considered technically unacceptable. During this round of discussions, as well as the second round, the agency clearly stated that Akal's proposal was "unacceptable but capable of being made acceptable." After the agency submitted its report supporting the evaluations, Akal did not challenge the agency's evaluation of its proposal. Thus, to the extent Akal may have initially protested the evaluation of its proposal, it abandoned this protest basis by not rebutting the agency report on this matter in its subsequent protest filings. See D & M General Contracting, Inc., B-259995; B-259995.2, May 8, 1995, 95-1 CPD ¶ 235.

price is so low as to render a proposal technically unacceptable is not a valid basis for protest. See SAIC Computer Sys., B-258431.2, Mar. 13, 1995, 95-1 CPD ¶ 156.

Akal alleges that the agency's source selection decision was not based on the best value evaluation scheme stated in the RFP. We agree. Although the RFP stated that technical factors were equal to price, the Navy did not consider the higher rated, higher priced BAFOs in its selection decision, but rather awarded the contract on the basis of the lowest priced, technically acceptable BAFO and did not inform offerors of this changed evaluation scheme. While source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results, see Grey Advertising, Inc. 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325, they do not have the discretion to announce in the solicitation that they will use one evaluation plan and then follow another without informing all offerors of any significant changes in the evaluation scheme. DynCorp, 71 Comp. Gen. 129 (1991), 91-2 CPD ¶ 575; Colonial Storage Co.; Paxton Van Lines, Inc., B-253501.5 et al., Oct. 19, 1993, 93-2 CPD ¶ 234, aff'd, Colonial Storage Co.-Recon., B-253501.8, May 31, 1994, 94-1 CPD ¶ 335.

Nevertheless, Akal was not prejudiced by the agency's actions. In this regard, prejudice is an element of a viable protest, and we will not sustain a protest where no reasonable possibility of prejudice is evident from the record. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379; Colonial Storage Co.; Paxton Van Lines, Inc., supra. Akal's price is more than \$1 million higher than Nation Wide's and its BAFO was rated technically equal to Nation Wide's, an evaluation result which Akal has not successfully challenged.<sup>6</sup> Moreover, Akal has not alleged that it could or would have significantly lowered its price had the Navy

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<sup>6</sup>Akal alleges that the use of the adjectival rating "acceptable" is too broad to allow for evaluating differences in technical superiority. This assertion is contrary to the well established principle that adjectival ratings and point scores are only a guide to assist contracting agencies in evaluating proposals. Grey Advertising, Inc. supra; Harris Corp.; PRC Inc., B-247440.5; B-247440.6, Aug. 13, 1992, 92-2 CPD ¶171. An agency may consider the relative technical merits of two proposals receiving the same adjectival rating and, if otherwise reasonable and consistent with the stated evaluation criteria, may properly find that one proposal is technically superior to another. A & W Maint. Servs., Inc., B-255711, Mar. 25, 1994, 94-1 CPD ¶ 214, aff'd, A & W Maint. Servs., Inc.-Recon., B-255711.2, Jan. 17, 1995, 95-1 CPD ¶ 24. An agency also may reasonably determine that two similarly rated proposals are technically equal. Astro Pak Corp., B-256345, June 6, 1994, 94-1 CPD ¶ 352. Thus, broad adjectival ratings, as used here, do allow agencies to reasonably conduct adequate relative technical evaluations of competing proposals.

informed it of the change in the evaluation scheme.<sup>7</sup> Accordingly, since Akal would not therefore be entitled to award under either evaluation approach, Akal was not prejudiced by the Navy's actions here. See Colonial Storage Co.; Paxton Van Lines, Inc., supra. See id.

Akal finally alleges that, due to the incomplete pre-protest evaluation and source selection reports and the agency's post-protest amending of these reports, the SSA must have directed award and then had the various boards fabricate the amended reports to support the SSA's decision. The record does not support this allegation. Although documentation developed after award may warrant less weight than other evidence in the record, we do consider such information together with the entire record, where, as here, the protester has had an opportunity to comment on the documentation. See Computer One, Inc., B-249352.2, Feb. 23, 1993, 93-1 CPD ¶ 252. The protester has presented no evidence which contradicts the post-protest documents, and these documents themselves do not contradict the pre-award record or otherwise suggest improper agency motives in their preparation. Rather, the amended evaluation board reports and the post-protest statement of the SSA further clarify the pre-award documents. For example, the amended TEB report stated that Akal's and Nation Wide's BAFOs were determined to be technically equal, which is entirely consistent with the pre-award TEB reports. Similarly, although the pre-award PEB report does not document its revised determination that Nation Wide's price was reasonable, the record confirms that the initial determination was revised and documents the reasons advanced for this revised determination.

The protest is denied.

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<sup>7</sup>Indeed, Akal alleges that its cost to operate under this contract, without overhead and profit, is \$10.5 million--still almost \$750,000 higher than Nation Wide's price.